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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 BARRY JAMES,

12 Petitioner,

13 v.

14 UNKNOWN,

15 Respondent.

Civil No. 11-2766 AJB (PCL)

**ORDER DISMISSING CASE  
WITHOUT PREJUDICE AND WITH  
LEAVE TO AMEND**

16 Petitioner, a state prisoner proceeding pro se, has filed a Petition for Writ of Habeas  
17 Corpus pursuant to 28 U.S.C. § 2254.

18 **FAILURE TO SATISFY FILING FEE REQUIREMENT**

19 Petitioner has failed to pay the \$5.00 filing fee and has failed to move to proceed in forma  
20 pauperis. Because this Court cannot proceed until Petitioner has either paid the \$5.00 filing fee  
21 or qualified to proceed in forma pauperis, the Court **DISMISSES** the case without prejudice.  
22 See Rule 3(a), 28 U.S.C. foll. § 2254.

23 **FAILURE TO NAME PROPER RESPONDENT**

24 Review of the Petition reveals that Petitioner has failed to name a proper respondent. On  
25 federal habeas, a state prisoner must name the state officer having custody of him as the  
26 respondent. Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule 2(a), 28  
27 U.S.C. foll. § 2254). Federal courts lack personal jurisdiction when a habeas petition fails to  
28 name a proper respondent. See id.

1 The warden is the typical respondent. However, “the rules following section 2254 do not  
 2 specify the warden.” Id. “[T]he ‘state officer having custody’ may be ‘either the warden of the  
 3 institution in which the petitioner is incarcerated . . . or the chief officer in charge of state penal  
 4 institutions.’” Id. (quoting Rule 2(a), 28 U.S.C. foll. § 2254 advisory committee’s note). If “a  
 5 petitioner is in custody due to the state action he is challenging, [t]he named respondent shall  
 6 be the state officer who has official custody of the petitioner (for example, the warden of the  
 7 prison).” Id. (quoting Rule 2, 28 U.S.C. foll. § 2254 advisory committee’s note).

8 A long standing rule in the Ninth Circuit holds “that a petitioner may not seek [a writ of]  
 9 habeas corpus against the State under . . . [whose] authority . . . the petitioner is in custody. The  
 10 actual person who is [the] custodian [of the petitioner] must be the respondent.” Ashley v.  
 11 Washington, 394 F.2d 125, 126 (9th Cir. 1968). This requirement exists because a writ of  
 12 habeas corpus acts upon the custodian of the state prisoner, the person who will produce “the  
 13 body” if directed to do so by the Court. “Both the warden of a California prison and the Director  
 14 of Corrections for California have the power to produce the prisoner.” Ortiz-Sandoval, 81 F.3d  
 15 at 895.

16 Here, Petitioner has not named a Respondent. In order for this Court to entertain the  
 17 Petition filed in this action, Petitioner must name the warden in charge of the state correctional  
 18 facility in which Petitioner is presently confined or the Director of the California Department  
 19 of Corrections. Brittingham v. United States, 982 F.2d 378, 379 (9th Cir. 1992) (per curiam).

## 20 **FAILURE TO ALLEGE EXHAUSTION OF STATE JUDICIAL REMEDIES**

21 Further, habeas petitioners who wish to challenge either their state court conviction or the  
 22 length of their confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C.  
 23 § 2254(b), (c); Granberry v. Greer, 481 U.S. 129, 133-34 (1987). To exhaust state judicial  
 24 remedies, a California state prisoner must present the California Supreme Court with a fair  
 25 opportunity to rule on the merits of every issue raised in his or her federal habeas petition. 28  
 26 U.S.C. § 2254(b), (c); Granberry, 481 U.S. at 133-34. Moreover, to properly exhaust state court  
 27 remedies a petitioner must allege, in state court, how one or more of his or her federal rights  
 28 have been violated. The Supreme Court in Duncan v. Henry, 513 U.S. 364 (1995) reasoned:

1 “If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal  
 2 rights, they must surely be alerted to the fact that the prisoners are asserting claims under the  
 3 United States Constitution.” Id. at 365-66 (emphasis added). For example, “[i]f a habeas  
 4 petitioner wishes to claim that an evidentiary ruling at a state court trial denied him [or her] the  
 5 due process of law guaranteed by the Fourteenth Amendment, he [or she] must say so, not only  
 6 in federal court, but in state court.” Id. at 366 (emphasis added).

7 Nowhere on the Petition does Petitioner allege that he raised his claims in the California  
 8 Supreme Court. In fact, he specifically indicates he did not seek review in the California  
 9 Supreme Court. (See Pet. at 4) If Petitioner has raised his claims in the California Supreme  
 10 Court he must so specify. “The burden of proving that a claim has been exhausted lies with the  
 11 petitioner.” Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997); see Breard v. Pruett, 134 F.3d  
 12 615, 619 (4th Cir. 1998); Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997); Oyler v.  
 13 Allenbrand, 23 F.3d 292, 300 (10th Cir. 1994); Rust v. Zent, 17 F.3d 155, 160 (6th Cir. 1994).

14 Further, the Court cautions Petitioner that under the Antiterrorism and Effective Death  
 15 Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a petition for a writ  
 16 of habeas corpus by a person in custody pursuant to the judgment of a State court. The  
 17 limitation period shall run from the latest of:

18 (A) the date on which the judgment became final by the  
 19 conclusion of direct review or the expiration of the time for seeking  
 such review;

20 (B) the date on which the impediment to filing an application  
 21 created by State action in violation of the Constitution or laws of the  
 United States is removed, if the applicant was prevented from filing  
 22 by such State action;

23 (C) the date on which the constitutional right asserted was  
 initially recognized by the Supreme Court, if the right has been  
 24 newly recognized by the Supreme Court and made retroactively  
 applicable to cases on collateral review; or

25 (D) the date on which the factual predicate of the claim or  
 26 claims presented could have been discovered through the exercise  
 of due diligence.

27 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West Supp. 2002).

28 The statute of limitations does not run while a properly filed state habeas corpus petition

1 is pending. 28 U.S.C. § 2244(d)(2); see Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999).  
 2 But see Artuz v. Bennett, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’  
 3 when its delivery and acceptance [by the appropriate court officer for placement into the record]  
 4 are in compliance with the applicable laws and rules governing filings.”). However, absent some  
 5 other basis for tolling, the statute of limitations does run while a federal habeas petition is  
 6 pending. Duncan v. Walker, 533 U.S. 167, 181-82 (2001).

7 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a  
 8 habeas petition “[i]f it plainly appears from the face of the petition and any exhibits annexed to  
 9 it that the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll.  
 10 § 2254. Here, it appears plain from the Petition that Petitioner is not presently entitled to federal  
 11 habeas relief because he has not alleged exhaustion of state court remedies.

#### 12 **FAILURE TO STATE A COGNIZABLE CLAIM ON HABEAS CORPUS**

13 Upon review of the Petition, it appears to the Court that a Petition for Writ of Habeas  
 14 Corpus brought pursuant to § 2254 is not the proper vehicle for the claims Petitioner presents.  
 15 Petitioner lists various medical problems he claims he is facing in prison. Specifically, Petitioner  
 16 claims that he has “two orthopedic hips [and] pins in his lower back” which cause him pain  
 17 when walking and that he struggles with his physicians. (Pet. at 6-9.) Petitioner’s claims are  
 18 not cognizable on habeas because they do not challenge the constitutional validity or duration  
 19 of confinement. See 28 U.S.C. § 2254(a); Preiser v. Rodriguez, 411 U.S. 475, 500 (1973); Heck  
 20 v. Humphrey, 512 U.S. 477, 480-85 (1994). “Section 2254 applies only to collateral attacks on  
 21 state court judgments.” McGuire v. Blubaum, 376 F. Supp. 284, 285 (D. Ariz. 1974).

22 In no way does Petitioner claim his state court conviction violates the Constitution or laws  
 23 or treaties of the United States. Rule 4 of the Rules Governing Section 2254 Cases provides for  
 24 summary dismissal of a habeas petition “[i]f it plainly appears from the face of the petition and  
 25 any exhibits annexed to it that the petitioner is not entitled to relief in the district court.” Rule 4,  
 26 28 U.S.C. foll. § 2254. Here, it is plain from the petition that Petitioner is not presently entitled  
 27 to federal habeas relief because he has not alleged that the state court violated his federal rights.  
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1 Challenges to the fact or duration of confinement are brought by petition for a writ of  
2 habeas corpus, pursuant to 28 U.S.C. § 2254; challenges to conditions of confinement are  
3 brought pursuant to the Civil Rights Act, 42 U.S.C. § 1983. See Preiser, 411 U.S. at 488-500.  
4 When a state prisoner is challenging the very fact or duration of his physical imprisonment, and  
5 the relief he seeks is a determination that he is entitled to immediate release or a speedier release  
6 from that imprisonment, his sole federal remedy is a writ of habeas corpus. Id. at 500. On the  
7 other hand, a § 1983 action is a proper remedy for a state prisoner who is making a constitutional  
8 challenge to the conditions of his prison life, but not to the fact or length of his custody. Id. at  
9 499; McIntosh v. United States Parole Comm’n, 115 F.3d 809, 811-12 (10th Cir. 1997). It  
10 appears that Petitioner challenges the conditions of his prison life, but not the fact or length of  
11 his custody. Thus, Petitioner has not stated a cognizable habeas claim pursuant to § 2254.

#### 12 **FAILURE TO SIGN PETITION**

13 Rule 2(c) of the Rules Governing Section 2254 Cases provides that “[t]he petition shall  
14 be typewritten or legibly handwritten and shall be signed under penalty of perjury by the  
15 petitioner.” Rule 2(c), 28 U.S.C. foll. § 2254 (emphasis added). Here, Petitioner has failed to  
16 sign the Petition.

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**CONCLUSION AND ORDER**

Based on the foregoing, the Court **DISMISSES** the case without prejudice and with leave to amend. If Petitioner wishes to challenge the fact or duration of his confinement by attacking his state court conviction, he must, **no later than February 7, 2012**: (1) file a First Amended Petition that cures the pleading deficiencies noted above **AND** (2) pay the \$5.00 filing fee **OR** submit adequate proof of his inability to pay the fee. If he wishes to challenge the conditions of his prison life, he must, **no later than February 7, 2012**: (1) file a new civil complaint pursuant to 42 U.S.C. § 1983 which will be given a new civil case number, **AND** (2) pay the \$350 filing fee **OR** file a motion to proceed in forma pauperis . **THE CLERK OF COURT IS DIRECTED TO MAIL PETITIONER A BLANK MOTION TO PROCEED IN FORMA PAUPERIS, A BLANK FIRST AMENDED HABEAS CORPUS PETITION FORM (28 U.S.C. § 2254) AND A BLANK 42 U.S.C. § 1983 CIVIL COMPLAINT FORM TOGETHER WITH A COPY OF THIS ORDER.**

**IT IS SO ORDERED.**

**DATED: December 5, 2011**

  
**Hon. Anthony J. Battaglia**  
**U.S. District Judge**